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No. 864

In the

Supreme Court of the United States

October Term, 1958

ALBERT GEORGE FOUTS
and
VIRGIL SUMMERS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Sixth Circuit

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COURT INDEX PRESS INC. Law Printers 509 Walnut St. Cincinnati 2, O.

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To the United States Court of Appeals for the Sixth Circuit

PETITIONERS pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on February 4, 1958 and August 28, 1958.

CITATIONS TO OPINIONS BELOW

The decision of the Federal Court of Appeals of February 4, 1958, is reported at 253 F. 2d 215 (CCA6). The District Court's finding of law and fact is unreported but is

printed in Appendix, Infra, Page 13. The Court of Appeals decision of August 28, 1958, is unreported but is printed in Appendix, Infra, Page 11.

JURISDICTION

An opinion of the Circuit Court of Appeals filed on February 4, 1958, remanded these cases to the United States District Court for a finding of fact concerning, solely, a determination of the issue of whether or not these defendants have waived their rights to a speedy trial. On May 9, 1958, after an open-court hearing, the District Court made a finding of fact. On August 28, 1958, the judgment of the Court of Appeals was entered. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1) and Rule 22 (2).

QUESTIONS PRESENTED

Whether a person who is within the territorial jurisdiction of the District Court, who was not served with summons, or a copy of an indictment, nor taken into custody, but is told by an F.B.I. agent that he has been indicted, has such knowledge of the indictment as would require him to make a demand for a trial and thereby preserve his right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States.

Whether a Defendant must make a demand for trial prior to arraignment.

Whether the Court of Appeals erred in remanding the cases for further hearing on a single issue after the record was closed and a jury verdict rendered.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment VI.

STATEMENT

A Federally Insured Bank at Ansonia, Ohio, was robbed on or about November 8 or 9, 1945. On August 23, 1946, a federal warrant was issued to the United States Marshal for the arrest of appellants, Albert George Fouts and Virgil Summers, and one Roy Montgomery Foster, pursuant to a complaint filed by F. B. I. Agent William H. Jahn, Jr. The appellants on this date were being tried for a State offense in the Montgomery County Court House, less than two (2) city blocks from the United States Marshal's office. On December 9, 1946, the Grand Jury for the Southern District of Ohio returned an indictment charging appellants with the violation of the bank-robbing statute, (Section 588, Title 12 U.S.C.).

On August 27, 1946, after having been convicted in the State Court, the appellants were incarcerated in the Ohio Penitentiary at Columbus, Ohio, said penitentiary being within the Southern District of Ohio.

The appellants were paroled by the State of Ohio in August, 1956, but instead of being released they were given into the custody of the United States Marshall who took them under the authority of the warrant issued August 23, 1946. Virgil Summers was arraigned in November of 1956 and Albert George Fouts was arraigned in October, 1956. Neither had ever been previously arraigned, nor had received a summons or copy of the complaint or indictment.

The Government conceded that it made no effort to arraign or bring these men to trial while they were in the Ohio State Penitentiary.

On January 4, 1957, the appellants filed motions and supporting affidavits requesting the Court to dismiss the indictment, in that they had not been afforded a speedy trial. The Court deferred its ruling until after the Jury

had been impaneled and the Government had presented its case. The Court then overruled the motions. Trial continued and the Jury returned a verdict of "Guilty".

The cases were duly appealed to the United States Court of Appeals for the Sixth Circuit and on February 4, 1958, the Court remanded the cases to the District Court for a finding of fact determining solely the question of waiver of a speedy trial. On May 9, 1958, the District Court, in the absence of a Jury, and after an open-court hearing, certified its findings to the Court of Appeals. The findings were that the appellants had knowledge of the indictment in February, 1947, when F. B. I. Agent William Jahn, Jr. told the petitioners that they were indicted, even though Mr. Jahn had never personally seen the indictment.

On August 28, 1958, the Court of Appeals affirmed the lower Court's finding that the appellants had knowledge of the indictment, had failed to make a demand for trial and thereby had waived their rights to a speedy trial.

REASONS FOR GRANTING THE WRIT.

I. At the most, the facts in this case indicate "weak information" of a pending indictment, almost ten (10) years prior to any activity by the Government to take official steps to arraign, inform and try these Petitioners.

A question of great importance is raised by these facts in that a determination ought to be made by this Court as to how far reaching or how limited the Sixth Amendment to the Constitution of the United States is with respect to the right to a speedy trial.

In *Johnson* v. *Zerbst*, 304 U.S. 458, this Court held:

> If the accused is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a juris-

dictional bar to a valid conviction and sentence depriving him of his life or his liberty." P. 468

At Page 463, Justice Black said:

> "The * * * right to be heard would be in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put to trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.*" "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."

At Page 464, his Honor said:

> "A WAIVER IS ORDINARILY AN INTENTIONAL RELINQUISHMENT OR ABANDONMENT OF A KNOWN RIGHT OR PRIVILEGE."

Petitioners believe that the decision cited, *supra*, in substance gives a broad interpretation to the Constitution and that the effect thereof is to hold that the waiver of any right afforded defendant by the Sixth Amendment must be intelligently and competently waived after having knowledge of his rights thereunder.

Petitioners believe that an important question arises as to when a criminal proceeding commences and whether or

not the right to counsel attaches itself within a reasonable time after the return of an indictment or whether counsel should be afforded only after arraignment.

In a civil action, the rights and duties of the parties are initiated by proper service of summons and in no instance would a Court uphold a judgment predicated upon service by hearsay. In a criminal case, the duties and obligations of the Court and its officers are far more pronounced than in a civil proceeding.

In this case, the lower Court found that a statement made to Petitioners by an F. B. I. agent, while they were in the penitentiary, was alone such notice as would require them to file a demand for trial with the District Court.

II. If it is intended to use the *Zerbst* case as authority for the premise that a defendant "requires the guiding hand of counsel at every step in the proceedings," it is necessary to consider a demand for trial as such necessary step in that proceeding.

At this point, it would appear from the various decisions of the Circuit Court of Appeals that a defendant must be highly skilled in the matters of law in order to make a proper demand. In *U. S. ex rel. Coleman* v. *Cox*, (CCA5) 47 Federal 2d. 988, 1931, the Court denies defendant's petition to Mandamus the District Court to set down for trial a charge pending against defendant, although defendant had sent to the Clerk of that District Court, a motion for a speedy trial, together with a request for a Writ of Habeas Corpus Ad Prosequendum to bring defendant into the District, and a letter requesting the Clerk to bring the motion to the Court's attention, which request was, apparently, ignored. Although agreeing that defendant clearly had a right to a speedy trial, the Circuit Court refused the application for the Writ, basing this decision on the ground that the record did not show that the motion had been brought directly to the attention of the

Court, so that no refusal to act was shown. The same authority was announced in *McCarty* v. *United States*, D. C. (CCA8) 19 Federal 2d. 462, 1927.

Now it has become obvious that the procedures would require the benefit of competent counsel. Petitioners full well realize that if we would run the gamit of steps in a criminal case in which counsel is required, within meaning of *Zerbst*, we are presenting a matter of first impression, which requires the guiding hand of this Honorable Court to protect those individuals who find themselves caught in a web of circumstance, wherein ultimately they may lose or waive a precious right afforded by the Constitution of these United States.

As shown above, because of the technical requirements which are attached to a demand for trial, counsel is necessary.

This unique question would not have arisen if the Government in this case would have proceeded beyond the advent of indictment with an early arraignment of the prisoners. Had it done this, these petitioners would have been brought before a Court who could then have advised them of their rights, not only to a speedy trial, but to counsel and the proper procedural steps could have been taken to afford them due process of law.

At this juncture, petitioners are of the opinion that the instant decision of the Sixth Circuit Court of Appeals is in conflict with the case of *Taylor* v. *United States of America*, 238 Federal 2d. 259 (D.C. CCA) (complete opinion Appendix D, Infra)

> We think this imprisonment there does not excuse the Government's long delay in bringing him to trial here, in the absence of showing that the Government, at a reasonable early date, sought and was unable to obtain his return for trial. It does not appear that the Government made any such effort before its successful effort in 1950.

and the Court further concluded:

> "it is to be borne in mind, the admonition of the Supreme Court that 'Courts indulge every reasonable presumption against waiver of fundamental rights' and that we do not presume acquiescence in the loss of fundamental rights."

III. This logically brings us to the point of what obligation rests upon a defendant prior to arraignment and whether or not "hearsay information" by an F. B. I. agent is sufficient "official notice" to require a defendant to make a demand not only for trial, but for arraignment.

A definition of "official notice" was made in the case of *National Metal* v. *Green*, 11 Ariz. 108, 9 LLA N.S. 1062. "A distinction is to be observed between knowledge of the pendency of a suit and notice thereof." Jurisdiction can be acquired if one does not submit himself to it, in no other way than by actual notice or by constructive notice. Actual notice is given only by personal service of process, constructive notice by some form of substantiated service. Where there is no service, there is no notice irrespective of any knowledge which the defendant may acquire informally. Notice is given only by service of process. Informal knowledge will not supply it and cannot be relied upon to put the one acquiring the knowledge on notice or to force him into Court to defend himself. If this is true in a civil case, then it should also be true in a criminal case. If service of summons officially starts an action in a civil Court, is it not true that service of an indictment is as important in a criminal case? This the Government did not do.

This Court in its recent decision in the case of *Mallory* v. *United States*, 354 U.S. 449 emphasizes the importance of speedy arraignment and rendered inadmissible, statements solicited from the defendant during the period of

unlawful detention. Petitioners feel that the same principal of law regarding an early arraignment applies in this instance.

IV. Petitioners have posed one final question regarding an upper Court referring back, by Mandate, to a District Court, a substantive question of law to be determined by a Court in a criminal case, in the absence of a Jury, and after the record had been closed and the Government had failed to prove its case with respect to notice.

Prior to the final hearing in the District Court, pursuant to the Court of Appeals' Mandate of February 4, 1958, the record failed to reveal any notice of a pending indictment. On a similar record in the *Taylor* case, *supra*, the Court immediately reversed the findings of the lower Court and discharged the prisoner. In the instant case, a subsequent hearing was held and the only evidence presented by the Government was the testimony of an F. B. I. agent, who stated that some 60 days after the indictment had been returned by the Grand Jury, he told the petitioners that they had been indicted.

Petitioners would not have brought this question to this Honorable Court of and by itself, had all other elements and emoluments of this case in each of its procedural steps been properly fulfilled by the Government. But when, from the beginning, the Government did not assume one iota of obligation toward these petitioners and after going to trial failed to prove a substantive fact, petitioners believe that a decision by a Court, in the absence of a jury, after the record is closed, is just one more link in the chain of errors that appear in this case.

The practical effect of the decision below could permit the Government to obtain an indictment, actually notify the accused, sit for a period of ten (10) years without effort to arraign or try the accused, and then, after the

defendant's rights afforded him by the Constitution of these United States had slipped from his grasp, claim that he acquiesced in the Government's laches by his failure to seek out and force the Government to act. This proposition is in conflict, not only with the letter but the SPIRIT of the law of our land.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be granted.

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APPENDIX A

~~JUDGMENT~~ OPINION OF COURT OF APPEALS, SIXTH CIRCUIT AFFIRMING LOWER COURT

(Decided August 28, 1958.)

Before MARTIN, MILLER and STEWART, Circuit Judges.

MARTIN, Circuit Judge. The appeals in these two criminal cases were dealt with in an opinion of this court filed on February 4, 1958, and reported at — F.(2d) — (C.A. 6). We there stated the basis of the appeal, discussed the principles involved, and cited relevant authorities. We stated our inability to review adequately, on the record before us, the issue of whether or not appellants have been deprived of their constitutional guarantee of a speedy trial on a federal indictment while they were incarcerated in the Ohio State Penitentiary, there being no evidence before us that the defendants had knowledge of such indictment. We considered, therefore, that justice would be served by a remand of the cases to the United States District Court for findings of fact "concerning, solely, a determination of the issue of whether or not these defendants have waived their right to a speedy trial."

Accordingly, a remand was ordered for findings concerning the waiver of right to trial by the defendants and we have now before us the findings of fact and conclusions of law of the district court, filed on May 9, 1958. The district court was careful to hold an open-court hearing on April 22, 1958, at which both defendants (Fouts and Summers) were present. Oral testimony was submitted on behalf of both the Government and the defendants. The court properly ruled incompetent a letter written to Fouts

by his attorney. It was also ruled that the testimony of three named witnesses offered by the Government did not tend to show that the defendants had knowledge of the indictment near the date of its return.

But the district court found that the testimony of an FBI Agent, William H. Jahn, Jr., showed that, in his official capacity, he had during the month of February, 1947, interviewed separately each of the defendants in the Ohio State Penitentiary. The FBI Agent testified that at such times he had informed the defendants of their indictment in the United States District Court in December of 1946 for burglary of the Ansonia Bank on the night of November 8-9, 1945. The agent testified, further, that defendant Summers stated that he was not going to make any move, was willing and wanted to wait to see "just what occurred in these matters." The defendants, who were present in the courtroom, did not contradict this testimony, nor was it otherwise contradicted. Neither defendant took the witness stand.

The able district judge, Honorable Lester L. Cecil, experienced in the trial of criminal cases for many years as a State trial judge and for the recent several years as a Federal trial judge, stated this finding: "From this testimony, the Court finds as a matter of fact that the defendants Fouts and Summers knew in February 1947, that they had been indicted in December 1946, for the Ansonia Bank burglary, occurring on the night of November 8 and 9, 1945. The Court also finds as a matter of fact that the defendants never requested a trial or raised any question about the pending indictment."

The district court adopted all facts stated in the stipulation entered into between the Assistant United States Attorney and the attorneys for the defendants. The court concluded that the defendants, having had knowledge in February of 1947 of the federal indictment returned in

December of 1946 and never having raised any question concerning prosecution, waived their rights to a speedy trial. Judge Cecil cited *Morland* v. *United States*, 193 F. (2d) 297 (C.A. 10); *Danziger* v. *United States*, 161 F. (2d) 229 (C.A. 9); *Campodonico* v. *United States*, 222 F. (2d) 310 (C.A. 9); *Carter* v. *State of Tennessee*, 18 F. (2d) 850 (C.A. 6); *Nolan* v. *United States*, 163 F. (2d) 768 (C.A. 8); all of which were cited in our opinion of February 4, 1958, — F. (2d) — (C.A. 6).

Upon the basis of the findings of fact of the district court, supported by substantial evidence and not clearly erroneous, we are in accord with its judgment that the motion of appellants for dismissal of the cases for want of a speedy trial was properly overruled.

The judgment is, accordingly, affirmed.

APPENDIX B

FINDINGS OF DISTRICT COURT

(May 9, 1958.)

The defendants, Albert George Fouts and Virgil Summers, were jointly indicted in this Court under Case No. 2182. Their appeals in the United States Court of Appeals for the Sixth Circuit were docketed separately, No. 13,158, Albert George Fouts vs. United States of America, and 13,159, Virgil Summers vs. United States of America.

These cases are now before this Court on mandates from the United States Court of Appeals for the Sixth Circuit, under date of April 3, 1958. The mandates read as follows:

> It is now here ordered and adjudged by this Court that this cause be and the same is hereby remanded to the district court for findings of fact, concerning

solely, a determination of the issue of whether or not the defendant has waived his right to a speedy trial."

These mandates are in pursuance to an opinion of the Court of Appeals, the printed copy of which is dated February 4, 1958. In the last paragraph of this opinion it is stated: "We find ourselves unable to review adequately the issue of waiver in the present state of the record. There is no evidence before us that these defendants had knowledge of the federal indictments pending against them. Accordingly, we think that justice will be served by remanding these cases to the district court for findings of fact concerning, solely, a determination of the issue of whether or not these defendants have waived their right to a speedy trial."

Subsequently, counsel for the defendants filed a motion in the Court of Appeals for a clarification of the language of this opinion. In an order of March 27, 1958, the Court of Appeals determined that the language was sufficiently clear and denied the motion. In the final paragraph of this order the Court concluded: "In the circumstances, *the United States District Court will determine the question of waiver* as promptly as conveniently may be done." (Emphasis added).

Pursuant to these mandates, this Court held a hearing on April 22, 1958, at which time oral testimony was submitted on behalf of the Government and of the defendants. Previous to the hearing, this Court ordered the defendant Virgil Summers to be returned to Dayton in sufficient time ahead of the hearing that his counsel might confer with him. Both defendants were present in the court room at the time of the hearing.

At the hearing the Government offered in evidence Exhibit A, which purports to be a copy of a letter written to the defendant Fouts on December 7, 1953 by an attorney,

James C. Britt of Columbus, Ohio. Counsel for the defendant Fouts objected to the introduction of this letter on the ground that it was a privileged communication between the defendant and his attorney. It was stipulated between counsel that if the Court held the letter to be admissible, no objection would be made as to the form in which it was presented.

The competency of this exhibit was urged by the Government on two grounds: first, as evidenced by the stipulation that incoming and outgoing mail of the defendant Fouts was read and censored by officers of the Ohio Penitentiary, where the defendant was incarcerated; secondly, the portion the Government claimed to be admissible was merely a report concerning a public document, the indictment in this instance. The Court reserved ruling on the admissibility of this letter until the attorneys for the parties could submit authorities.

The Court now rules that this letter is incompetent. The censorship of the mail was an essential requirement of the institution. It was necessary that the institution maintain such control, not only to insure the security of this particular prisoner, but for the general protection of the public and all inmates of the institution. The Court, therefore, does not regard this as an exception to the privileged relationship between attorney and client because of the presence or knowledge of a third person concerning the contents of the letter. The Court does consider that the letter constituted a confidential relationship between attorney and client and was privileged by reason thereof. The evidence contained in this letter is of no great importance since it would be cumulative and the date, December 7, 1953, is so near the time of release of the defendant that knowledge of the defendant as of that date would be of little, if any, avail to the Government.

The really pertinent testimony offered at the hearing was that of William H. Jahn, Jr., an F. B. I., agent. The testimony of Captain Paul G. Hudson, Dr. Robert W. Halliday and Roy E. Harmony, offered by the Government, did not tend to show that the defendants had knowledge of the indictment in the within case at or near the date of its return.

The witness Jahn testified that in February, 1947, he visited the defendants Summers and Fouts in the Ohio State Penitentiary and interviewed each one of them separately. In these interviews, he informed the defendants that they had been indicted in this Court in December, 1946, for the burglary of the Ansonia Bank on the night of November 8 and 9, 1945. The defendants did not discuss with Mr. Jahn the substance of the offense charged in the indictment, although that was apparently the purpose which took him to the penitentiary. Mr. Jahn reports that Mr. Summers stated "that he was not going to make any move, that he was willing to wait; he wanted to wait and see just what occurred in these matters". At the time of the interview with Mr. Summers, Mr. Jahn also discussed another offense or offenses with him. This testimony is uncontradicted. The defendants, although present in the court room, did not take the witness stand to testify or deny the statements of Mr. Jahn.

From this testimony, the Court finds as a matter of fact that the defendants Fouts and Summers knew in February, 1947, that they had been indicted in December, 1946, for the Ansonia Bank burglary, occurring on the night of November 8 and 9, 1945. The Court also finds as a matter of fact that the defendants never requested a trial or raised any questions about the pending indictment.

The record in this case discloses that on January 7, 1957, the Assistant United States Attorney and the attorneys for the defendants entered into a stipulation of facts pertaining

to the motions of the defendants to dismiss, for the reason that they had not had a speedy trial. A further stipulation of facts was entered into by counsel and filed on March 19, 1957.

This Court adopts all the facts as stated in the stipulations to which reference has just been made and makes the facts therein stated a part of its Findings of Facts in carrying out the mandates of the Court of Appeals.

In support of the conclusions hereinafter stated, the Court makes reference to the following facts:

On July 6, 1946, Albert George Fouts and Virgil Summers, the defendants herein, were arrested on a warrant charging them with armed robbery in Montgomery County, Ohio. (This was an offense against the State of Ohio and is in no way connected with the Ansonia Bank burglary, a Federal offense, with which the defendants are charged in this case.) They were arraigned and tried in the Common Pleas Court, Montgomery County, Ohio, the trial lasting from August 14, 1946 to August 26, 1946. They were found guilty and on August 27, 1946, as a result of the conviction they were incarcerated in the Ohio Penitentiary at Columbus, Ohio. The defendant Fouts was released from this imprisonment September 20, 1956, and the defendant Summers was released November 8, 1956.

It is stated in Item 6 of the Stipulation filed March 19, 1957, that they were arraigned in Common Pleas Court, Montgomery County, Ohio, on July 6, 1946. Since this arraignment was had before the writer of these findings and conclusions, it is personally known by him that the robbery in Montgomery County with which they were indicted, occurred in June, 1946.

This Court concludes that the interval of time from November, 1945, when the offense herein was committed and December, 1946, when the defendants were indicted, was not an unreasonable length of time in which to return an

indictment. There is no indication that the federal authorities knew before August 23, 1946, the time of the issuance of a warrant by the United States Commissioner in this case, that these defendants were the ones who had perpetrated the crime. The Court further concludes that the defendants, having knowledge in February, 1947, of the indictment in December, 1946, and having never raised any question about prosecution, waived their rights to a speedy trial.

It seems to be a well established Federal rule that the right to a speedy trial is a personal right which may be waived. "Moreover, the right to a speedy trial is a personal right which may be waived and is waived if the accused fails to assert his rights. Morland at no time demanded or sought an earlier trial on the indictment." Morland v. United States, 193 F.2d, 297; Danziger v. United States, 161 F.2d, 299; Gompodonico v. United States, 22 F.2d, 310.

Frankel v. Woodrough, 7 F.2d, 796, is not exactly applicable to the case at bar. In this case both crimes involved were federal offenses. In the case at bar, the defendants were imprisoned in a State institution on a State offense and the pending indictment was in the Federal Court on a Federal charge.

Finally, the Court concludes that the defendants being in the Ohio State Penitentiary as a result of a crime which they committed subsequent to the crime for which they were indicted in this case, they were imprisoned as a result of their own actions and could not be heard to complain about not having a speedy trial. Carter v. State of Tennessee, 18 F.2d, 850, (Sixth Circuit). "The appellant cannot be heard to complain at this late day of a procedure for which he was personally responsible." Nolan v. United States, 163 F.2d, 768.

Taylor v. United States, 238 F.2d, 259, decided October 25, 1956, by the United States Court of Appeals for the

District of Columbia has been cited by counsel for the defendants as persuasive authority for their position. This Court does not so regard it. The court in the Taylor case recognized the principle that the right to a speedy trial may be waived. At page 261, it is stated: "It is also contended by the Government that the right to a speedy trial is waived by the acquiescence of the accused in the delay; that is, acquiescence through failure to make demand for a speedy trial, to which he is entitled; and, indeed, the authorities indicate that this is correct." The indictment in this case was not returned for three and one-half years after the commission of the crime. Further, there is no evidence that the defendant ever knew of the indictment "until the writ of habeas corpus ad prosequendum was executed in 1946." At page 262, the Court indicated that the case was a "weak" one and stated: "Had the evidence been overwhelming, so that no infirmity might be made to appear, a different result might be reached." While the record of the trial in the case at bar is not before the Court of Appeals, counsel for the defendants will not argue that their case is analogous to the Taylor case in this respect.

The judgment of this Court is that the motion of the defendants to dismiss for want of a speedy trial was properly overruled.

The Court having complied with the mandate of the Court of Appeals, it is hereby ordered that these Findings of Fact and Conclusions of Law in triplicate, together with the original papers, the transcript of the hearing of April 22, 1958, and the exhibits be sent by the Clerk of this Court to the Clerk of the United States Court of Appeals for the Sixth Circuit.

(Signed) LESTER L. CECIL
Judge, United States District Court, S. D. O.

APPENDIX C

~~JUDGMENT~~ OPINION OF COURT OF APPEALS, SIXTH CIRCUIT REMANDING CASE TO DISTRICT COURT

(Decided February 4, 1958.)

Before SIMONS, Chief Judge, MARTIN and STEWART, Circuit Judges.

MARTIN, Circuit Judge. A federally insured bank at Ansonia, Ohio, was robbed on or about November 8 or 9, 1945. A state warrant was issued on July 6, 1946, charging appellants, Fouts and Summers [and another person] with this armed robbery. These defendants were arrested, arraigned and tried in the Common Pleas Court of Montgomery County, Ohio. The trial was begun August 14, 1946, and was terminated twelve days later [August 26, 1946] with a verdict of guilty as charged. On the day following their conviction and sentence, appellants were incarcerated in the Ohio Penitentiary at Columbus, which is located within the Southern District of Ohio. In August of 1956, after about ten years of their sentences had been served, both appellants were paroled; but they were not released from the state prison because of federal detainers which had been lodged with the prison authorities.

A federal warrant for the arrest of Fouts, Summers and two accomplices was issued by the United States Commissioner on August 23, 1946; and, on December 9, 1946, the federal Grand Jury for the Southern District of Ohio indicted appellants and their accomplices for violation of the bank-robbery statute [§ 588, Title 12, U.S.C.]. The indictment was duly filed with the Clerk of the United States District Court for that district on the same day. The record discloses no effort on the part of the United States

Government to bring these appellants to trial on the federal indictment pending during their ten-year period of confinement in the Ohio Penitentiary. Pursuant to the warrant issued August 23, 1946, Fouts was arrested at the state prison and delivered to the United States Marshal on September 20, 1956. In the same manner, Summers was arrested on November 8, 1956. Both were arraigned in the United States District Court for the Southern District of Ohio, Western Division, and entered pleas of not guilty to the indictment.

Motions were filed on January 4, 1957, seeking dismissal of the indictment and discharge of the defendants. The motions alleged that the government's unnecessary delay in prosecuting the appellants had deprived them of their right to a speedy trial, guaranteed by the Sixth Amendment to the Constitution of the United States. The district court deferred ruling on these motions until the government had completed its case, after which both motions were overruled.

The trial in the district court resulted in verdicts of guilty. Accordingly, on January 11, 1957, judgments of conviction and sentence were entered, committing both appellants to the custody of the Attorney General for terms of five years. The appeals now before us are from those judgments and commitments.

The Sixth Amendment to the Constitution of the United States provides in part that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." Nowhere does the Constitution set forth any test for determining whether this right has been denied or abridged, nor do the statutes furnish help in this respect.

The number of years having elapsed since the commission of the offense is an important, but not conclusive, criterion. We recognize that, in extreme cases of delay, a fair trial cannot be had because of unavailability of wit-

nesses, or faltering memories. An example of extreme delay [20 years] may be found in *United States* v. *Chase*, 135 F. Supp. 230 (D.C. Ill; 1955). The passage of ten years in the instant case does not establish conclusively the impossibility of a fair trial, but the lapse of such lengthy period is a monition that an extremely careful appraisal of the circumstances should be made by the court.

It is well established that the accused does not forfeit his right to a speedy trial solely because of his being confined in the penitentiary. *United States, ex rel. Coleman*, v. *Cox*, 47 F. (2d) 988 (C. A. 5; 1931); *Frankel* v. *Woodrough*, 7 F. (2d) 796 (C. A. 8; 1925). It is equally elementary that the constitutional guarantee of a speedy trial is directed at a delay in prosecution to which the accused has not contributed. Accordingly, we have held that a defendant may not complain of delay occasioned by his becoming a fugitive from justice during the period in which his indictment was pending. *Hart* v. *United States*, 183 F. 368 (C. A. 6; 1910), cert. denied, 220 U. S. 609. We reached a consistent result under analogous circumstances in *Carter* v. *State of Tennessee*, 18 F. (2d) 850 (C. A. 6; 1927). There, a three-year delay of trial in the United States District Court had resulted from the incarceration of the accused in a State penitentiary following his conviction for a different offense. No motion for a speedy trial had been made. These circumstances were, of course, of the accused's own making. See also *Morland* v. *United States*, 193 F. (2d) 297 (C.A. 10; 1951); *Nolan* v. *United States*, 163 F. (2d) 768 (C. A. 8; 1947), cert. denied, 333 U. S. 846. Indeed, situations are conceivable where it might be better strategy for the defendant to fail to insist upon a speedy trial rather than to demand one. For example, see *Campodonico* v. *United States*, 222 F. (2d) 340, 315, 316 (C. A. 9; 1955).

The constitutional right to a speedy trial is personal and may be waived by failure to assert it. *Danziger* v. *United States*, 161 F. (2d) 99 (C. A. 9; 1949), cert. denied, 332 U. S. 769. Just what constitutes waiver of the right is a question of fact to be determined in each case. Of course, a defendant who is unaware that he is under indictment cannot be held to have waived his right. See *Taylor* v. *United States*, 238 F. (2d) 259, 261 (D. C. App.; 1956). Where the accused has been imprisoned under maximum security conditions so that it is practicably impossible for him to petition an appropriate court for a speedy trial, waiver of the right should not be inferred. *United States* v. *Chase*, 135 F. Supp. 230 (N. D. Ill.).

We find ourselves unable to review adequately the issue of waiver in the present state of the record. There is no evidence before us that these defendants had knowledge of the federal indictments pending against them. Accordingly, we think that justice will be served by remanding these cases to the district court for findings of fact concerning, solely, a determination of the issue of whether or not these defendants have waived their right to a speedy trial.

It is so ordered.

APPENDIX D

CONFLICTING OPINION

ELLSWORTH P. TAYLOR, Appellant,
vs.
UNITED STATES OF AMERICA.

238 F. 2d 259

United States Court of Appeals
District of Columbia Circuit

BASTIAN, Circuit Judge.

Appellant was convicted of the crimes of housebreaking and robbery, and appeals urging three grounds for reversal: (1) the statute of limitations; (2) violation of the constitutional guarantee of speedy trial; and (3) failure of the trial court to direct a verdict of not guilty.

The offenses for which appellant was indicted and convicted were committed on July 19, 1950. The indictment was not returned until February 23, 1954, more than three years after the commission of the offenses. However, the record shows that in November 1950 appellant was sentenced to serve five to seven and one-half years in prison in New York State and remained in the penitentiary of that state until, on petition of the Government filed on February 6, 1956, a writ of habeas corpus (ad prosequendum) was issued by the United States District Court for the District of Columbia. He was then returned to the District of Columbia, arraigned February 17, 1956, and convicted at the trial, which commenced March 28, 1956.

The pertinent sections of the United States Code relating to the statute of limitations are quoted in the margin.

(1). The contention of appellant that he is entitled to the protection of the statute of limitations is foreclosed by Green v. United States, 1951, 88 U.S. App. D.C. 249, 188 F. 2d 48, and McGowen v. United States, 1939, 70 App. D. C. 268, 105 F. 2d 791.

(2) Appellant says, however, that his right to a speedy trial as guaranteed by the Sixth Amendment has been violated and, under the circumstances of this particular case, we agree. The evidence against appellant was, to say the least, weak, and, while it is not necessary, as hereinafter stated, that we pass upon the question as to whether the evidence or lack of it entitled him to a directed verdict of not guilty, we believe that the long delay in the return of the indictment, the long delay between indictment and trial, the failure of the record to disclose that appellant even knew that he was under indictment, and his long absence from the District of Columbia, certainly prevented him or his attorney from preparing a proper defense.

The Government urges that the delay in bringing appellant to trial was his fault, since it was caused by his imprisonment in New York. We think his imprisonment there does not excuse the Government's long delay in bringing him to trial here, in the absence of a showing that the Government, at a reasonably early date, sought and was unable to obtain his return for trial. It does not appear that the Government made any such effort before its successful effort in 1956, though the crime was committed in 1950 and the indictment returned in 1954. In Ponzi v. Fessenden, 258 U.S. 254, 42 S. Ct. 309, 66 L.Ed. 607, a defendant, during his imprisonment under a federal sentence, was produced for trial in a Massachusetts court. In sustaining the right of Massachusetts to try him, the

Supreme Court referred to the "comity between the state and national government in reference to the enforcement of the laws of each" and said: "The authorities, except when special statutes make an exception, are all agreed that the fact that a defendant in an indictment is in prison serving a sentence for another crime gives him no immunity from the second prosecution." 258 U.S. at pages 263-264, 42 S. Ct. at page 312.

(3) It is also contended by the Government that the right to a speedy trial is waived by the acquiescence of the accused in the delay, that is, acquiescence through failure to make demand for a speedy trial, to which he is entitled and, indeed, the authorities indicate that this is correct.

In this case, however, as stated, there is no showing that appellant even knew he was indicted and entitled to a trial. Indeed, the most that can be said is that his knowledge that he was accused of the crimes was gained through an interview with a detective from the District of Columbia who claims to have obtained a confession from the appellant in 1951. Although this interview took place in 1951, no indictment was in fact returned until 1954, and there is no showing that appellant knew he had been indicted until the writ of habeas corpus (ad Prosequendum) was executed in 1956.

(4) There is to be borne in mind the admonition of the Supreme Court that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights" and that "we 'do not presume acquiescence in the loss of fundamental rights.'" Johnson v. Zerbst, 1938, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L.Ed. 1461.

Whatever may be the limitations on the right to a speedy trial by way of waiver, certainly in this case the right was not waived due to the incarceration of appellant, his apparent lack of knowledge that he had been indicted and his consequent inability to insist on the right to a speedy

trial. Nor can it be said that the lack of a speedy trial did not harm appellant for the possibility of serious prejudice existed here under circumstances disclosing a "weak" case. Had the evidence been *overwhelming*, so that no infirmity might be made to appear, a different result might be reached. Berger v. United States, 1935, 295 U.S. 78, 88-89, 55 S.Ct. 629, 79 L.Ed. 1314. The long lapse of time between the commission of the offenses and the trial, the incarceration of appellant throughout the entire interim, and the resulting handicap to the procurement of witnesses who might have supported appellant's alibi, or any other defense, must seriously have handicapped the preparation of a defense. This harm could have been avoided by an earlier indictment, and notice to appellant that he had been indicted. Upon such notice, appellant or his counsel could have made "an affirmative request or demand for trial," and appellant, his friends and counsel could have proceeded to an investigation before the trial became cold. For these reasons we cannot agree that appellant waived his right to a speedy trial as assured by the Sixth Amendment.

We do not rely on the mere lapse of time between the commission of the offenses and the date of indictment, considered by itself, for that is governed by the statute of limitations. It is the combination of the factors set forth above which motivates our decision. We do not wish to be understood to do other than apply the rule stated to the facts and circumstances of this particular case.

In view of the disposition made of this phase of the case it is not necessary that we pass upon the claim of the appellant that he was entitled to a verdict of not guilty as a matter of law.

Reversed, with directions to vacate the judgment of conviction and to dismiss the indictment.

APPENDIX E

SIXTH AMENDMENT

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States. Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX F

STATUTORY PROVISIONS CITED AND QUOTED

U. S. C. 1254 (1)

By writ of Certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

FILE COPY

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FILED
OCT 13 1958
JAMES R. BROWNING, Clerk

No. 364

In the Supreme Court of the United States

OCTOBER TERM, 1958

ALBERT GEORGE FOUTS AND VIRGIL SUMMERS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
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OPINIONS BELOW

The opinion of the Court of Appeals, affirming the judgment of the District Court (Pet. 11), is not yet reported. The prior opinion of the Court of Appeals remanding the cases to the District Court for further findings of fact is reported at 253 F. 2d 215. The opinion of the District Court setting forth its findings (Pet. 13) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1958. The petition for a writ of certiorari was filed on September 15, 1958. The juris-

diction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the courts below properly found that petitioners waived their right to a speedy trial.

STATEMENT

On August 23, 1946, a federal warrant issued for the arrest of petitioners and two others for the robbery of a federally insured bank in Ansonia, Ohio, on November 8 or 9, 1945 (App. 15a, 1a). An indictment was returned on December 9, 1946, in the United States District Court for the Southern District of Ohio, Western Division, charging bank robbery in violation of 12 U. S. C. 588b (App. 15a, 14–3a). At the time of the indictment, petitioners were incarcerated in the Ohio State Penitentiary at Columbus, serving state sentences for armed robbery committed in Montgomery County, Ohio in June, 1946 (App. 16a).[1] Ten years later, in August, 1956, petitioners were paroled by the state but not released because of federal detainers lodged there. In September and November, 1956, petitioners were delivered to federal authorities pursuant to the August, 1946, warrant (App. 16a). On arraignment in October, 1956, in the

[1] The initial decision of the Court of Appeals as reported in the petition (Appendix C, p. 20) incorrectly creates the impression that the state sentences were imposed for the same robbery charged in the federal indictment. This misapprehension is corrected in the printed report. See 253 F. 2d 215.

The state warrant was issued on July 6, 1946, trial was begun on August 14, 1946, and culminated August 26, 1946, in a verdict of guilty (App. 16a).

District Court, petitioners entered pleas of not guilty to the federal indictment (App. 16a, 17a).

On January 4, 1957, petitioners sought dismissal of the federal indictment on the ground that their constitutional rights to a speedy trial under the Sixth Amendment had been violated (App. 3a–9a, 17a). The District Court deferred ruling on the motions until the government had completed its case, heard a renewal of the motions, and then dismissed them (App. 17a). Petitioners were found guilty by a jury (App. 17a) and sentenced to terms of five years (App. 18a–20a).

On separate appeals consolidated by the Court of Appeals, petitioners urged that the District Court erred in dismissing their motions to dismiss the indictment in that they had been denied the right to a speedy trial (App. 10a–14a). The Court of Appeals, noting that the record did not indicate whether petitioners, during their incarceration by the state, had knowledge of the federal indictment pending against them, remanded the case to the District Court for a factual determination as to whether petitioners had waived their rights to a speedy trial (253 F. 2d 215).

On April 22, 1958, in compliance with this mandate, the District Court held a hearing, with both petitioners present and represented by counsel (Tr. 1).[2] The government produced the testimony of F. B. I. agent Jahn, the officer in charge of the bank robbery investigation who had signed the initial complaint and

[2] Tr. refers to the transcript of the testimony taken before the District Court on the remand of the case, a copy of which has been filed with this Court.

who had examined court records of the return of the indictment (Tr. 5, 15, 16). He testified that he interviewed petitioners separately in the Ohio State Penitentiary in February 1947—talking with Fouts once and Summers twice (Tr. 5–6). He began his interviews by advising each of the indictment returned against him in December 1946 for the burglary of the Ansonia, Ohio, bank (Tr. 7). Fouts said he had no comment (Tr. 8). Summers said that he was not going to make any move, that he was willing to wait, and that he wanted to wait and see what happened (Tr. 9). Jahn specifically remembered prefacing his interviews with a statement about the indictment because the "basic point" of his interview was "the question of winding all of that [pending matters] up together rather than the possibility of [petitioners] facing them separately" (Tr. 17).

The government also produced the testimony of state prison and parole authorities which established, *inter alia*, the earliest dates on which it was definitely documented that petitioners were aware of the federal detainers placed against them—in the case of Fouts, some five and a half years, and Summers two years prior to their release (Tr. 21, 26–27).[3]

In a written opinion, the District Court found that an indictment filed in December, 1946, for an offense committed in November, 1945, was returned in a reasonable length of time, that petitioners, having been

[3] Other evidence, a 1953 letter from a Columbus attorney to his client, Fouts, regarding the federal indictment, was ruled incompetent on the objection that it was a privileged communication (Tr. 41, Pet. 15).

informed by Agent Jahn in February, 1947, of the indictment, and having raised no question about prosecution, had waived their rights to a speedy trial, and that petitioners, having been incarcerated for a crime committed subsequently to that for which they were indicted in the federal case, were imprisoned because of their own actions and could not be heard to complain (Pet. 13–19). The Court of Appeals affirmed.

ARGUMENT

At the outset it should be noted that it has been, for many years, the established policy of the federal government, and United States Attorneys have been directed, not to defer the prosecution of outstanding indictments merely because defendants are serving sentences in federal or state institutions. Hence, whatever may have been the reason for the delay here (which does not appear in the record) there is involved no question of general policy as to deferment of trial pending incarceration for another offense.

Neither does this case present the issue of whether prejudice must be shown in order to warrant dismissal of the indictment for lack of a speedy trial. There are no findings by the courts below on prejudice or lack of it. The court below seems to have assumed that, if petitioners had not waived or for some other reason forfeited their right to a speedy trial, dismissal would have been required irrespective of any proof of prejudice. This is in accord with a recent decision of the Second Circuit in *United States* v. *Lustman*, decided July 30, 1958, petition for a writ of certiorari

filed September 12, 1958, No. 361. See also *Petition of Procoo*, 17 F. R. D. 183, affirmed, 350 U. S. 857.

However, as both the Second Circuit in the decision cited and the court below have pointed out, it is established in the federal courts that the right to a speedy trial is a personal one which is waived if no demand is made, unless the defendant is for some reason not in a position to make the demand. *Taylor v. United States*, 238 F. 2d 259 (C. A. D. C.); *China v. United States*, 228 F. 2d 151 (C. A. 4); *Danziger v. United States*, 161 F. 2d 299 (C. A. 9), certiorari denied, 332 U. S. 769; *Collins v. United States*, 157 F. 2d 103 (C. A. 9); *Patch v. United States*, 110 F. 2d 817 (C. A. 10), certiorari denied, 310 U. S. 648; *Worthington v. United States*, 1 F. 2d 154 (C. A. 7), certiorari denied, 266 U. S. 626; *United States v. Research Foundation*, 155 F. Supp. 650 (S. D. N. Y.); *United States v. Chase*, 135 F. Supp. 230 (N. D. Ill.); *United States v. Alagia*, 17 F. R. D. 15 (D. Del.). Admittedly, petitioners made no demand for a prompt trial. Thus, the narrow issue presented here is whether the courts below properly found, on the particular circumstances presented by this record, that there are no facts which would take this case out of the general rule that demand must be made. There is no occasion to review the specific findings of the district court which were affirmed by the Court of Appeals on this issue. It is clear that each of the petitioners was informed some two months after the indictment of its existence, its place, its return date and the offense charged. This information was given to them by the F. B. I. agent who had initiated the

complaint in the first instance, had testified before the grand jury, and who had personal knowledge of the existence of the indictment after checking the records of the District Court (Tr. 5–17). Petitioners were on clear and explicit notice of the fact that they were under federal indictment. In contrast, in *Taylor v. United States*, 238 F. 2d 259 (C. A. D. C.), relied upon by petitioners, Taylor knew only that he was accused of crimes. The indictment was not returned until three years after he had been so advised.

The fact that petitioners were incarcerated in a State institution did not prevent them from seeking a trial on the federal indictment of which they had knowledge. Petitioners were able to communicate with the court, friends or counsel. They were not unfamiliar with criminal procedure. Defendants have been held to their duty to demand a trial even though they were incarcerated. *Morland v. United States*, 193 F. 2d 297 (C. A. 10); *Carter v. Tennessee*, 18 F. 2d 859 (C. A. 6).[1] A defendant in jail for another offense is not entitled to greater rights than one who is not in jail. Indeed, as to petitioner Summers, the record indicates that failure to demand a trial was a conscious and deliberate choice, since, when he was

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[1] Cf. *United States v. Lane*, 135 F. Supp. 230 (N. D. Ill.), where the court found no waiver despite absence of demand because defendant was held under maximum security conditions which made it virtually impossible to demand a trial.

While, as noted above, the policy of the federal government is to prosecute defendants incarcerated for other offenses, courts have held that defendants cannot complain of delays caused by their own wrongdoing. See *Nolan v. United States*, 193 F. 2d 768 (C. A. 8), certiorari denied, 333 U. S. 846.

informed of the indictment, he stated that he would wait and see what happened. The finding of waiver is therefore amply supported.*

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1958.

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* There is no merit to petitioners' argument that the Court of Appeals erred in remanding their cases to the District Court for findings as to the issue of waiver. Under 28 U. S. C. 2106, a court of appellate jurisdiction is given broad powers as to matters brought before it for review including the right to "remand * * * and direct * * * or require such further proceedings to be had as may be just under the circumstances". This right extends to both civil and criminal matters. See *Ballew* v. *United States*, 160 U. S. 187, 202. A remand may involve the authority to take further evidence. See *Willing* v. *Bienstock*, 302 U. S. 272.

U. S. GOVERNMENT PRINTING OFFICE 1959